[redacted]

No. [redacted]

[redacted] W. [redacted], PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY.

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 437

OTTO V. BURNETT, PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 25, 1964

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 5365

OTTO V. BURNETT, Somerset, Kentucky, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, 230 East Ninth Street, Cincinnati, Ohio, Defendant.

RELEVANT DOCKET ENTRIES

6-12-63	Complaint filed.
6-19-63	Motion to Dismiss—filed by Defendant together with Notice of Hearing July 8, 1963 at 2:00 P. M. and certificate of service.
7- 8-63	Motion of Defendant to Dismiss argued—Motion submitted.
10- 4-63	Memorandum Opinion and Order—defendant's motion to dismiss this action because the complaint fails to state a claim against this def. upon which relief may be granted—dismissed at plaintiff's costs.
10-14-63	Notice of Appeal by Pltf filed

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 12, 1963

Plaintiff, Otto V. Burnett, says:

1. The Jurisdiction of this Court is based upon the provisions of 45 U.S.C.A. Section 51, et seq. as amended, 1939;

2. That the amount in controversy exceeds $10,000.00 exclusive of interest and costs;

3. That plaintiff is a citizen of the State of Kentucky and defendant is an Ohio corporation;

4. On June 4, 1963, under the style of Otto V. Burnett v. The New York Central Railroad Company, No. A194644, Court of Common Pleas, Hamilton County, Ohio, a suit comprising the same facts was dismissed otherwise than upon the merits of the case, solely for want of venue, and this action is now filed under the savings clause of Ohio Revised Code, Section 2305.19.

5. On March 17, 1960, and prior thereto, the defendant, The New York Central Railroad Company, a corporation, was the owner of, and was operating as a common carrier by railroad, various lines of railroad in Hamilton County, Ohio and Wabash, Indiana and various other states and between the states of Indiana and Ohio.

6. Plaintiff states that at the time of the commencement of this action, the defendant maintained offices in Hamilton County, Ohio; did solicit and accept orders for freight; did enter into contracts of carriage as a common carrier; did employ numerous employees in said county; did transact general business in said county and state, and was doing [fol. 3] business at the time aforesaid, and is presently doing business within the true intent and meaning of the Act of Congress known as The Federal Employer's Liability Act (as amended) (Title 45, U.S.C.A. et seq.).

7. Plaintiff states that at the time first mentioned, and at the time of the accident hereinafter complained of, he was employed by and at work for the defendant at and about Wabash, Indiana, as a maintenance and way employee; that his duties were in furtherance of interstate commerce and transportation, and directly, closely and substantially affected such commerce; and at the time of the accident hereinafter complained of, was engaged in clearing the rails of the defendant, so that trains, cars and equipment of the defendant could operate thereon.

8. Plaintiff states that on March 17, 1960, he was working for the defendant, and was assigned to a crew at Wabash, Indiana, to clear ice from the rails of defendant's

line of track; plaintiff was issued a pick by defendant with which to clear ice from said rails; plaintiff states that his direct superior and foreman was goading the men to work faster to rerail an engine, and instructed the plaintiff to stop striking the ice on said rails at a right angle to the ice on the rail, but to strike said ice on the rails with a swing which caused the pick to strike at an oblique angle. Plaintiff states that while following the orders so given and hurrying to perform his work, he was struck by a pick and injured as hereinafter described.

9. Plaintiff states that defendant, by and through its agents, was negligent in failing to provide plaintiff with a [fol. 4] safe place to work, and a safe method of work, in that the tool supplied plaintiff was dull and not suited for chipping the ice; in ordering plaintiff to swing said pick so that it would strike the ice at an oblique angle; in hurrying plaintiff and other workers to chip and break the hard, frozen ice without first salting and softening the ice; in pushing the plaintiff and failing to supply a sufficient number of employees to clear said rails; in failing to follow the company doctor's orders to relieve the plaintiff of duty, and in keeping plaintiff on duty after he was injured.

10. Plaintiff further states that as a direct and proximate result of the negligence of the defendant, plaintiff was struck in his scrotum by a pick, causing injury to the scrotum, the testicles and the urinary tract; that plaintiff was rendered impotent and continues so; that plaintiff suffered a conversion hysteria with a resultant paralysis of the right side and loss of grip in the right hand; that plaintiff developed a generalized convulsive disorder; that plaintiff was hospitalized at Somerset City Hospital, St. Joseph Hospital, and Central Baptist Hospital at Lexington, Kentucky, and has incurred hospital expenses in the sum of $1,105.93; that he has been treated by various physicians and has incurred medical expense for treatment in the sum of $1,200.00; that plaintiff has incurred certain drug bills in the sum of $200.00 and will continue to incur said bills in the future; that he has experienced great pain, and has been unable to perform any work or labor or engage in any

gainful occupation. At the time of said accident, while in the employ of the defendant, plaintiff earned approximately $100.00 a week; since March 21, 1960, he has been totally disabled and to the date of filing of this Petition has lost [fol. 5] wages in the sum of $15,400.00.

11. Plaintiff states that his ability to work and earn wages has been permanently impaired, and that he has been, and will be, totally disabled for the performance of any employment for which he is fitted.

12. Plaintiff states that by reason of the negligence of the defendant he has been damaged in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00).

Wherefore, Plaintiff prays judgment against the defendant in the sum of $350,000.00 and his costs herein expended.

Goldman, Cole and Putnick, 911 First National Bank Building, Cincinnati 2, Ohio, 241-8137, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed June 19, 1963

The defendant, The New York Central Railroad Company, moves the Court to dismiss this action because the complaint fails to state a claim against this defendant upon which relief maybe (sic) granted.

Davis, Farley, Short & Roberts, By J. W. Farley, Attorneys for defendant, 310 Second National Building, Cincinnati 2, Ohio.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER—Filed October 4, 1963

The question presented by defendant's motion for dismissal is whether the saving clause of a state statute can be applied so as to extend the period within which an action must be commenced under the Federal Employers Liability Act (45 U.S.C., Sections 51, et seq.). Alleging facts describing a situation covered by the Act, plaintiff filed his petition in the state court within three days of the expiration of the 3-year limitation period provided in 45 U.S.C., Section 56. After being non-suited by ruling on defendant's motion directed to venue, plaintiff, within one year brought action in this court. He resists the present motion on the ground that the savings clause in Section 2305.19, Ohio Revised Code, has application since the state court action failed otherwise than upon the merits and he refiled within the year.

Except for a state court decision hereinafter mentioned, counsel agree that there is no decision directly in point. It is, however, plaintiff's contention that the "trend" of the federal court decisions points to the allowance of commencement of action within the savings clause provision. The "trend" is said to have originated in *Osbourne* v. *United States*, 164 F. 2d 767 (2d Cir. 1947), where the period of limitation was extended because plaintiff was a prisoner of war, and carried further in *Frabutt* v. *New York, Chicago & St. Louis R. Co.*, 84 F. Supp. 460 (W. D. Pa. 1949), where an injured party was a non-resident alien residing in a country with which United States was at war. *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (4th Cir. 1949), cert. den. 339 U. S. 919 (1950), went a short [fol. 7] step further and held that the defendant was estopped from asserting the limitation defense because of fraud. Of similar effect is *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959). It will be noted that in these cases delay was occasioned either by factors beyond the control of the parties (prisoner of war, existence of state of war), or by the conduct of the defendant (fraud).

An entirely different situation presently prevails, since the choice of time and place of filing was in the exclusive control of the plaintiff.

Whether plaintiff could have maintained a tort action under the law of Ohio does not conclusively appear, but such an action would clearly have been barred by the state's 2-year statute of limitations (Ohio Revised Code, Section 2305.10). Either for the purpose of avoiding that limitation or for other reasons plaintiff brought his suit under the FELA and gained among other advantages that of the 3-year period. Having possessed himself of that advantage, plaintiff now seeks the refuge of the Ohio savings clause. However, in our opinion, he is precluded from doing so. Since asserting a right created by the Act, he must comply with its integral and substantive provisions. The limitation provision being substantive in nature, it cannot be extended by the savings clause of the Ohio statute.

The state court case in point to which earlier reference was made is *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Railway Company,* 48 Tenn. App. 299, 346 S. W. 2d 273 (1961), wherein a conclusion is expressed as to the present state of the federal law which is not supported by presently existing decisions. While the per- [fol. 8] suasiveness of the Tennessee opinion is recognized, as is the sympathetic aspect of the present plaintiff's situation, lest a hard case make bad law it is here held that the Ohio savings clause is without application. Additionally, justification does not appear for extending a barely discernible "trend" to reach a conclusion which is admittedly contrary to existing law. Accordingly,

It Is Ordered that the defendant's motion to dismiss this action because the complaint fails to state a claim against this defendant upon which relief may be granted should be and it is hereby sustained and said action is dismissed at plaintiff's costs, with notation of plaintiff's exceptions.

John W. Peck, District Judge.

[fol. 9]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
April 11, 1964

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

This cause is argued by Douglas G. Cole for plaintiff-appellant and by John J. Farley for defendant-appellee and is submitted to the Court.

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—June 2, 1964

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:

Paul C. Weick, Chief Judge.

[fol. 11]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15627

OTTO V. BURNETT, Plaintiff-Appellant,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION—June 2, 1964

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The question in this appeal is whether the three year period of limitation within which actions for damages under the Federal Employers' Liability Act (45 U.S.C. § 56[1]) must be brought, may be extended by the Ohio Savings Statute.[2]

---

[1] 45 U.S.C. § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

[2] Ohio Rev. Code § 2305.19 provides:

"In an action commenced, or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. . . ."

Plaintiff, a resident of Kentucky and an employee of the railroad, was injured on March 17, 1960, in the course of his employment in the state of Indiana. He filed suit under the Act in the Common Pleas Court of Hamilton County, [fol. 12] Ohio, on March 15, 1963, just a few days before the statute had run. The action in the state court was dismissed on June 4, 1963 because of improper venue. On June 12, 1963 plaintiff instituted the present action in the United States District Court for the Southern District of Ohio. The District Court sustained defendant's motion to dismiss on the ground that the action was barred by the three-year limitation in the Act.

The limitation provided in the Act contains no exceptions. Plaintiff seeks to engraft the Ohio Savings Statute on the Act as an exception.

The Ohio Savings Statute is in the chapter of the Ohio Code dealing with limitation of actions. In this chapter there is a specific limitation for actions for bodily injury or for injury to personal property. R. C. § 2305.10 provides:

> "An action for bodily injury or injuring personal property shall be brought wtihin two years after the cause thereof arose."

If the Ohio statute of limitations had been applicable, the first action commenced in the Common Pleas Court would have been barred since it was not filed within two years from the date of the accident.

In the absence of a Federal statute of limitations, the state statute of limitations would control. *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Englander Motors, Inc.* v. *Ford Motor Co.*, 293 F.2d 802, 804 (CA 6). In such a situation, the period of limitation would not have been uniform throughout the country, but would have varied depending upon the particular statute of each state. If plaintiff had filed the present action in a state which had no Savings Statute, there would be no question about his claim being barred.

The undoubted purpose of Congress in enacting the three-year limitation in the Act was to bring about uniformity of

application. The limitation in the Federal statute controls over an inconsistent state statute. *Atlantic Coast Line R.* v. *Burnette,* 239 U. S. 199, 200; 34 Am.Jur., Limitation of Actions, § 53, pp. 51, 52.

But the limitation in the Act is more than merely procedural. It is contained in an Act which created a new right and prescribed the remedy. The remedy is a part of [fol. 13] the right and is a matter of substance. Failure to bring the action within the time prescribed extinguished the cause of action. *Central Vermont Ry.* v. *White,* 238 U. S. 507; *Harrisburg* v. *Richards,* 119 U. S. 199, 214; *Bell* v. *Wabash Ry. Co.,* 58 F.2d, 569 (CA 8); *American R. Co. of Porto Rico* v. *Coronas,* 230 Fed. 545 (CA 1); 35 Am.Jur., Master and Servant, § 469, p. 885.

The State Savings Statute was not applicable. *Bell* v. *Wabash Ry. Co.,* supra; *United States for the use of Gibson Lumber Co.* v. *Boomer,* 183 Fed. 726, 730 (CA 8); *Cotton* v. *Wabash R. Co.,* 198 Iowa 535, 36 A.L.R. 913.

Appellant concedes that—

> "... during the period 1910-1947 American Courts uniformly held that statutory actions generally, and the FELA (45 U.S.C.A. §56) in particular, could not be tolled after the manner of remedial statutes of limitation, for any reason, even for fraud or concealment."

He states:

> "It is from this period of American jurisprudence that the trial court abstracted the rule applied to this case." (Appellant's brief, p. 3)

Appellant contends that since 1947 Courts have applied exceptions to the rule and one should be applied here. He relies on the following cases: *Osbourne* v. *United States,* 164 F.2d 767 (CA 2), where a limitation was tolled because the litigant was a prisoner of war; *Frabutt* v. *New York, C. & St.L.R.Co.,* 84 F.Supp. 460 (W.D.,Pa.), where the limitation was extended as between citizens of countries at war; *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F.2d 253 (CA 4), cert. denied 339 U. S. 919, and subsequent

decisions reported in 190 F.2d 935 and 202 F.2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F.Supp. 84 (D.,Md.); *Toran* v. *New York, N.H. & H.R.Co.*, 108 F.Supp. 564 (D.,Mass.), where the Courts applied the doctrine of estoppel to toll the statute on account of fraud practiced on the plaintiff by the prevailing party.

The Supreme Court in *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, and his Court in *Louisville & Nashville R. Co.* v. *Disspain*, 275 F.2d 25 (CA 6), applied [fol 14] the same principle in tolling the limitation in the Act because of fraud.[3]

In *Glus*, the Court said: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." (359 U. S. at 232).

In *Osbourne* and *Frabutt* the litigants were relieved of the consequences of the Act because of circumstances beyond their control, namely, prisoner of war, and war.

The closest case cited by appellant was *Breneman* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 346 S.W.2d 273 (Tenn. App.), where plaintiff in an FELA case had been non-suited in the District Court and brought a second suit in the state court in Tennessee within the period permitted by a state statute (T.C.A. § 28-106) somewhat comparable to the Ohio Savings Statute. The Tennessee Court was of the view that although there was a conflict in the Federal cases, "*Glus* has effected a change in the rule of the earlier cases". We agree that the rule may have been changed with respect to cases involving fraud. In *Breneman*, the railroad physician had misadvised plaintiff concerning his injury.

We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inapposite. We prefer to follow the decisions in *Bell*, *Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.

---

[3] There is a conflict of authority on whether a substantive statute of limitation may be tolled because of fraudulent concealment. 15 A.L.R.2d 500, 502.

The predicament in which plaintiff finds himself was caused not by fraud but by his own act or failure to act. We are not prepared to extend the rule in *Glus* to the facts of the present case.

The judgment of the District Court is affirmed.

[fol. 15] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 16]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. _____

OTTO V. BURNETT,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO the Honorable Chief Justice and the Associates Justices of the Supreme Court of the United States:

Petitioner, Otto V. Burnett, prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in that court in the above entitled case, affirming the

judgment of the United States District Court for the Southern District of Ohio, Western Division, sitting at Cincinnati, Ohio.

OPINIONS BELOW

The opinion of the Court of Appeals, not as yet reported, is attached hereto as Appendix B. The memorandum opinion and order of the District Court, not reported, is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on the 2nd day of June, 1964.

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

The question presented is whether the three-year period of limitation applicable to actions for damages under the Federal Employers' Liability Act (45 USC § 56) may be extended by the Ohio Savings Statute (O.R.C. 2305.19).

The lower federal courts in this case held that as the statute created the right and also prescribed the remedy, the limitation period so fixed was substantive in nature, and could not be extended.

It is the contention of petitioner that there is nothing in the language or history of the Federal Employers' Liability Act to indicate that a claim under the Act expires absolutely, for all purposes and under all circumstances, in three years. To the contrary, petitioner submits that the

limitation period thereunder is subject to be tolled by the same valid reasons applicable to any other tort action, including war, fraud, estoppel or state saving statutes.

There is no inherent magic in categorizing the limitation period under the Act as substantive or procedural in nature, so as to justify the federal courts giving effect to the Ohio Savings Statute as to common law causes of action (remedial statutes of limitations), but denying the effect of the same Ohio Savings Statute as to a statutory cause of action (substantive statutes of limitation).

The decision of the Court of Appeals in this cause, as well as those very old decisions of other circuits relied upon by that court, holding that the statutory limitation period created by the Federal Employers' Liability Act is substantive in nature, not subject to being extended for any reason, are in direct conflict with those later decisions of other Courts of Appeals. The best exemplification is the decision of the Fourth Circuit in *Scarborough* v. *Atlantic Coastline R. Co.*, 178 F. 2d 253, cert. denied, in 339 U. S. 919, holding that the FELA limitation period could be extended on account of fraud practiced on the plaintiff, and of the Eighth Circuit in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), holding that the statutory limitation period created by the Clayton Act, 15 USCA § 15 b, is procedural in nature, subject to being tolled.

While this Court, in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, established that the ilmitation period created under the Federal Employers' Liability Act is not inflexible, but can be tolled by the doctrine of equitable estoppel, the Court has not passed upon the more basic conflict which rages throughout lower courts, both state

and federal, i.e., the procedural-substantive dichotomy. It is earnestly submitted that a decision is urgently needed that the congressional intention, in enacting the three-year limitation period under the Federal Employers' Liability Act in particular, and other federally created rights in general, was simply to set up a uniform statute of limitations throughout the United States, and that such statutes of limitation are subject to being tolled in the same fashion and for the same reasons as any other statutes of limitation.

STATUTES INVOLVED

UNITED STATES

The first paragraph of Title 45, USC § 56, provides:

"No actions shall be maintained under this act unless commenced within three years from the day the cause of action accrued."

OHIO

The Ohio Savings Statute is contained in O.R.C 2305-

"In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff.... fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date."

STATEMENT OF CASE

Petitioner, a resident of Kentucky, an employee of respondent-railroad, was injured on March 17, 1960, in Indiana, while in the course of his employment. He commenced an action under the Federal Employers' Liability

Act, 45 USC § 51, et. seq., in the Common Pleas Court of Hamilton County, Ohio, on March 13, 1963. Upon respondent's motion directed to improper venue, petitioner was non-suited in the Ohio court on June 4, 1963.

On June 12, 1963, petitioner refiled this action in the United States District Court for the Southern District of Ohio, relying upon the Ohio Savings Statute, O.R.C. 2305.-19. Respondent filed its Motion to Dismiss, alleging that the Complaint had not been filed in the District Court within the three-year limitation period applicable to FELA actions, 45 USC § 56, and that the Ohio Saving Statute was inapplicable; the District Court sustained said Motion, and ordered the action dismissed (Appendix A). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the court holding that the limitation period was more than procedural, that it was a matter of substance, that failure to bring the action within the time prescribed extinguished the cause of action and that such time could not be extended by the state saving statute. (Appendix B)

HOW FEDERAL QUESTION IS PRESENTED

The federal question was presented at the outset, the Complaint alleging a cause of action under the Federal Employers' Liability Act, 45 USC § 51, et. seq. The decisions of both federal courts were based upon the older, narrow, ritualistic interpretation of the limitation period under said Act, 45 USC § 56.

Petitioner submits that the sole question before this Court is the correct interpretation to be accorded this limitation statute.

REASONS FOR GRANTING THE WRIT

The decisions of both the Court of Appeals and the District Court in the instant case were based upon the rule that the cause of action under the FELA was created by statute, that this statute also created the remedy; therefore the limitation period prescribed therein was substantive in nature, and could not be extended.

Petitioner has conceded that prior to 1947, this was the rule.

However, since 1947, courts throughout the United States have reexamined the reasons behind this rule, and have concluded that such holdings were mere semantic distinctions unsupported by reason, and were harsh and unjust. Such courts have in fact largely emasculated the rule by engrafting a growing list of exceptions thereto, based upon various equitable principles.

In the FELA field, we find the decisions of *Osbourne* v. *United States*, 164 F. 2d 767 (1947), CA-2, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F. Supp 460 (W.D. Pa., 1949), *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253, CA-4, cert. denied 339 U. S. 919, 190 F. 2d 935, 202 F. 2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F. Supp. 84 (D. Md.); and *Toran* v. *New York, N. H. & H. R. Co.*, 108 F. Supp. 564 (D. Mass.), where the Courts have held that the limitation period could be tolled because of war, or on account of fraud practiced on the plaintiff.

The rationale opposing the artificial and mechanistic treatment of these cases was best stated in the *Scarborough* case, supra:

> "The decisions in the *Osbourne* and *Frabutt* cases show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation

> of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances."

This court recognized the sharp conflict between the pre-1947 and post-1947 cases in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, and held that the limitation period under the FELA could be extended by the doctrine of equitable estoppel based on fraud.

Every court which has critically reexamined this rule since 1947 has found a basis for extending the particular statutory limitation period. The cases have followed two broad avenues to reach the same result.

In the cases which have considered the FELA limitation period, the courts have discussed the substantive-procedural dichotomy, but none has made the flat assertion that the limitation statute, 45 USC § 56, was solely procedural in nature. Rather, in each case the exception was based upon equitable considerations which these courts held were so basic as to be applicable to both procedural and substantive limitation statutes.

In contrast to this form of analysis of the FELA limitation, the federal courts, of late, in interpreting the parallel limitation statute under the Clayton Act; 15 U. S. C. § 15 b, have flatly asserted that it is procedural in nature, and therefor subject to being extended. As stated in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (CA-8, 1962):

> "While we believe that the controlling factor in determining whether the statute should be tolled for

> fraudulent concealment is congressional intent, irrespective of the doubtful procedural-substantive dichotomy, if such a classification is significant, it is our view that the evidence supports plaintiff's contention that § 4 B is procedural."

In like vein are the cases of *Public Service Co. of New Mexico* v. *General Electric Co.*, 315 F. 2d 306 (CA-10, 1963) and *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (CA-9, 1964).

Petitioner recognizes that all of the post-1947 era cases cited above, as examples of the revolution which has taken place in extending the hitherto restrictive limitations under statutory causes of action, have involved fact situations in which plaintiff found himself in the predicament of being unable to commence his action within the statutory period because of circumstances beyond his own control, the most frequent example being fraudulent concealment. In such extreme circumstances, the courts have felt it necessary to utilize equitable principles to avoid the harsh result inherent in a too-literal interpretation of the particular limitation statute.

The Court of Appeals, in the instant case, noting this thread running through these cases, sought to distinguish petitioner's plight on the ground that he had placed himself in his predicament by his own act in choosing the wrong forum in which to initiate his suit; that such a circumstance did not call forth the same need for equitable intervention by the court as did facts based on fraud.

The fundamental error in this analysis is that the Court overlooked the fact that savings statutes of the type involved in this action were originally enacted in the various states, and thereafter applied as part of the procedural law

by the federal courts, in order to satisfy the same basic need for equitable intervention as existed in the case of fraud.

This Court has recognized the common equitable background of the two situations. In discussing the legislative history of the removal statute, 28 U. S. C. § 1406.(a), which prevents, as between federal courts, the same injustice as savings statutes do, as between state courts, this Court, in *Goldlawr* v. *Heiman*, 369 U. S. 463 (1962), held:

> "The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. . . .
> "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, congress, by the enactment of § 1406 (a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities'."

Justice Cardozo, while on the New York bench, made similar observations regarding the savings statutes in *Gaines* v. *City of New York*, (1915), 215 N. Y. 533, 109 N. E. 594 at page 596.

It is petitioner's contention that it is logically unsound to permit, as did the Court of Appeals, the FELA limitation

statute, 45 USC § 56, to be tolled by reason of war, fraud, fraudulent concealment or estoppel, but to balk at recognition of the next logical and necessary step, to-wit: that these same equitable principles demand that such limitation period also be tolled by a saving statute.

This Court's decision in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, might have been more fortunate if it had cut through the profitless semantics of the substantive-procedural debate entirely — as did the Federal cases cited above, or, failing that, at least have clearly stated beyond doubt or quibble, that the limitation statute involved was procedural in nature, and subject to being tolled by the same equitable factors as any other remedial statute. The failure to do so has resulted in the lower federal and state courts being left to their own devices in interpreting the extent of the applicability of the *Glus* case.

On the one hand we find the Court of Appeals of Tennessee, in *Breneman* v. *C. N. O. & T. P. Ry. Co.*, 346 S. W. 2d 273 (1961), in a fact situation closely analogous to the instant case, holding that the FELA limitation period was tolled by the Tennessee Saving Statute, T.C.A. § 28-106, which is comparable to Ohio Revised Code § 2305.19, and basing their decision on the proposition:

> "Although there is a conflict in the Federal cases, we think *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 has effected a change in the rule of earlier cases."

and concluding:

> "We are not unmindful that the saving statute, T.C.A. § 28-106 applies only to a statute of limitations which relates to the remedy. *Automobile Sales Co.* v.

> *Johnson*, 174 Tenn. 38, 122 S.W. 2d 453, 120 A.L.R. 370. As we have seen, however, under the Federal law the distinction has been abolished and is no longer recognized with respect to actions under the Federal Employers' Liability Act. The limitation being procedural only a new action may be instituted within one year after a voluntary dismissal."

We also find the Ninth Circuit, in *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (1964), holding:

> "Many of the cases supporting appellant's contention do so by way of dicta. See *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. p. 234, 79 S. Ct. p. 762, 3 L. Ed. 2d 770. We believe, where circumstances dictate, the trend is toward applying the fraudulent concealment exception to all statutes of limitation, be they limitations on the right itself or merely on the remedy."

At the same time, we find the Court of Appeals, in the instant case, stating:

> "We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inopposite. We prefer to follow the decisions in *Bell, Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.
>
> "We are not prepared to extend the rule in *Glus* to the facts of the present case."

A decision by this Court that statutes of limitation, be they limitations on the right itself or merely on the remedy, are subject to the very same exceptions, and specifically,

that the Federal Employers' Liability Act limitation period can be tolled by an appropriate state savings statute, would be in accord with the reasoning of prior decisions of this Court, and would remove the distressing uncertainties and conflicts into which lower courts have fallen.

CONCLUSION

Petitioner submits that the limitation statute under the Federal Empolyers' Liability Act, 45 USC § 56, has never been interpreted by this Court as being substantive in nature, not subject to extension by an applicable state saving statute. On the contrary, the logical extension of the rule of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, allows no other conclusion but that such statute may be so tolled.

Because the United States Court of Appeals for the Sixth Circuit erroneously considered that it was not bound to follow the rule of the *Glus* case, the petition for a writ of certiorari should be granted, and the United States Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted,

OTTO F. PUTNICK
911 First National Bank Bldg.
Cincinnati, Ohio (45202)
Phone: 241-8137
Attorney for Petitioner

Of Counsel:
DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio (45202)
Phone: 241-8137

APPENDIX A

MEMORANDUM OPINION AND ORDER

(Filed October 4, 1963)

The question presented by defendant's motion for dismissal is whether the saving clause of a state statute can be applied so as to extend the period within which an action must be commenced under the Federal Employers' Liability Act (45 U.S.C., Sections 51, et seq.). Alleging facts describing a situation covered by the Act, plaintiff filed his petition in the state court within three days of the expiration of the 3-year limitation period provided in 45 U.S.C., Section 56. After being non-suited by ruling on defendant's motion directed to venue, plaintiff, within one year brought action in this court. He resists the present motion on the ground that the savings clause in Section 2305.19, Ohio Revised Code, has application since the state court action failed otherwise than upon the merits and he refiled within the year.

Except for a state court decision hereinafter mentioned, counsel agree that there is no decision directly in point. It is, however, plaintiff's contention that the "trend" of the federal court decisions points to the allowance of commencement of action within the savings clause provision. The "trend" is said to have originated in *Osbourne v. United States*, 164 F. 2d 767 (2d Cir. 1947), where the period of limitation was extended because plaintiff was a prisoner of war, and carried further in *Frabutt v. New York, Chicago & St. Louis R. Co.*, 84 F. Supp. 460 (W. D. Pa. 1949), where an injured party was a non-resident alien residing in a country with which United States was at war. *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253

(4th Cir. 1949), cert. den. 339 U. S. 919 (1950), went a short step further and held that the defendant was estopped from asserting the limitation defense because of fraud. Of similar effect is *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959). It will be noted that in these cases delay was occasioned either by factors beyond the control of the parties (prisoner of war, existence of state of war), or by the conduct of the defendant (fraud). An entirely different situation presently prevails, since the choice of time and place of filing was in the exclusive control of the plaintiff.

Whether plaintiff could have maintained a tort action under the law of Ohio does not conclusively appear, but such an action would clearly have been barred by the state's 2-year statute of limitations (Ohio Revised Code, Section 2305.10). Either for the purpose of avoiding that limitation or for other reasons plaintiff brought his suit under the FELA and gained among other advantages that of the 3-year period. Having possessed himself of that advantage, plaintiff now seeks the refuge of the Ohio savings clause. However, in our opinion, he is precluded from doing so. Since asserting a right created by the Act, he must comply with its integral and substantive provisions. The limitation provision being substantive in nature, it cannot be extended by the savings clause of the Ohio statute.

The state court case in point to which earlier reference was made in *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Railway Company*, 48 Tenn. App. 299, 346 S. W. 2d 273 (1961), wherein a conclusion is expressed as to the present state of the federal law which is not supported by presently existing decisions. While the per-

suasiveness of the Tennessee opinion is recognized, as is the sympathetic aspect of the present plaintiff's situation, lest a hard case make bad law it is here held that the Ohio savings clause is without application. Additionally, justification does not appear for extending a barely discernible "trend" to reach a conclusion which is admittedly contrary to existing law. Accordingly,

IT IS ORDERED that the defendant's motion to dismiss this action because the complaint fails to state a claim against this defendant upon which relief may be granted should be and it is hereby sustained and said action is dismissed at plaintiff's costs, with notation of plaintiff's exceptions.

/s/ JOHN W. PECK
District Judge

APPENDIX B

No. 15627

UNITED STATES COURT OF APPEALS

(For the Sixth Circuit)

OTTO V. BURNETT, *Plaintiff-Appellant*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appeulee*

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided June 2, 1964

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The question in this appeal is whether the three year period of limitation within which actions for damages under the Federal Employers' Lia-

bility Act (45 U. S. C. § 56[1]) must be brought, may be extended by the Ohio Savings Statute.[2]

Plaintiff, a resident of Kentucky and an employee of the railroad, was injured on March 17, 1960, in the course of his employment in the state of Indiana. He filed suit under the Act in the Common Pleas Court of Hamilton County, Ohio, on March 15, 1963, just a few days before the statute had run. The action in the state court was dismissed on June 4, 1963 because of improper venue. On June 12, 1963 plaintiff instituted the present action in the United States District Court for the Southern District of Ohio. The District Court sustained defendant's motion to dismiss on the ground that the action was barred by the three-year limitation in the Act.

The limitation provided in the Act contains no exceptions. Plaintiff seeks to engraft the Ohio Savings Statute on the Act as an exception.

The Ohio Savings Statute is in the chapter of the Ohio Code dealing with limitation of actions. In this chapter there is a specific limitation for actions for bodily injury or for injury to personal property. R.C. § 2305.10 provides:

> "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

If the Ohio statute of limitations had been applicable, the first action commenced in the Common Please Court would

---

[1] 45 U.S.C. § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

[2] Ohio Rev. Code § 2305.19 provides:

"In an action commenced, or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. . . ."

have been barred since it was not filed within two years from the date of the accident.

In the absence of a Federal statute of limitations, the state statute of limitations would control. *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Englander Motors, Inc.* v. *Ford Motor Co.*, 293 F. 2d 802, 804 (CA 6). In such a situation the period of limitation would not have been uniform throughout the country, but would have varied depending upon the particular statute of each state. If plaintiff had filed the present action in a state which had no Savings Statute, there would be no question about his claim being barred.

The undoubted purpose of Congress in enacting the three-year limitation in the Act was to bring about uniformity of application. The limitation in the Federal statute controls over an inconsistent state statute. *Atlantic Coast Line R.* v. *Burnette*, 289 U. S. 199, 200; 34 Am. Jur., Limitation of Actions, § 53, pp. 51, 52.

But the limitation in the Act is more than merely procedural. It is contained in an Act which created a new right and prescribed the remedy. The remedy is a part of the right and is a matter of substance. Failure to bring the action within the time prescribed extinguished the cause of action. *Central Vermont Ry.* v. *White*, 238 U. S. 507; *Harrisburg* v. *Richards*, 119 U. S. 199, 214; *Bell* v. *Wabash Ry. Co.*, 58 F.2d, 569 (CA 8); *American R. Co. of Puerto Rico* v. *Coronas*, 230 Fed. 545 (CA 1); 35 Am.Jur., Master and Servant, § 469, p. 885.

The State Savings Statute was not applicable. *Bell* v. *Wabash Ry. Co.*, supra; *United States for the use of Gibson Lumber Co.* v. *Boomer*, 183 Fed. 726, 730 (CA 8); *Cotton* v. *Wabash R. Co.*, 198 Iowa 535, 36 A.L.R. 913.

Appellant concedes that —

> "... during the period 1910-1947 American Courts uniformly held that statutory actions generally, and the FELA (45 U.S.C.A. § 56) in particular, could not be tolled after the manner of remedial statutes of limitation, for any reason, even for fraud or concealment."

He states:

> "It is from this period of American jurisprudence that the trial court abstracted the rule applied to this case." (Appellant's brief, p. 3)

Appellant contends that since 1947 Courts have applied exceptions to the rule and one should be applied here. He relies on the following cases: *Osbourne* v. *United States*, 164 F.2d 767 (CA 2), where a limitation was tolled because the litigant was a prisoner of war; *Fraubutt* v. *New York, C. & St.L.R.Co.*, 84 F.Supp. 460 (W.D.,Pa.), where the limitation was extended as between citizens of countries at war; *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F.2d 253 (CA 4), cert. denied 339 U. S. 919, and subsequent decisions reported in 190 F.2d 935 and 202 F.2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F.Supp. 84 (D., Md.); *Toran* v. *New York, N.H. & H.R.Co.*, 108 F.Supp. 564 (D., Mass.), where the Courts applied the doctrine of estoppel to toll the statute on account of fraud practiced on the plaintiff by the prevailing party.

The Supreme Court in *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, and this Court in *Louisville & Nashville R. Co.* v. *Disspain*, 275 F.2d 25 (CA 6), applied the same principle in tolling the limitation in the Act because of fraud.[3]

---

[3] There is a conflict of authority on whether a substantive statute of limitation may be tolled because of fraudulent concealment. 15 A.L.R.2d 500, 502.

In *Glus*, the Court said: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." (359 U. S. at 232).

In *Osbourne* and *Frabutt* the litigants were relieved of the consequences of the Act because of circumstances beyond their control, namely, prisoner of war, and war.

The closest case cited by appellant was *Breneman* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 346 S.W.2d 273 (Tenn. App.), where plaintiff in an FELA case had been non-suited in the District Court and brought a second suit in the state court in Tennessee within the period permitted by a state statute (T.C.A. § 28-106) somewhat comparable to the Ohio Savings Statute. The Tennessee Court was of the view that although there was a conflict in the Federal cases, "*Glus* has effected a change in the rule of the earlier cases." We agree that the rule may have been changed with respect to cases involving fraud. In *Breneman*, the railroad physician had misadvised plaintiff concerning his injury.

We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inapposite. We prefer to follow the decisions in *Bell, Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.

The predicament in which plaintiff finds himself was caused not by fraud but by his own act or failure to act. We are not prepared to extend the rule in *Glus* to the facts of the present case.

The judgment of the District Court is affirmed.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964.

No. 437

OTTO V. BURNETT,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Of Counsel
ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio

ROBERT M. DENNIS
Central Trust Tower
Cincinnati, Ohio
Attorney for Respondent.

Court Index Press, Inc.—Law Printers—809 Walnut Street, Cincinnati, Ohio 45202

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In the

Supreme Court of the United States

October Term, 1964.

No. ———

OTTO V. BURNETT,

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THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

TO the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Respondent, The New York Central Railroad Company, prays that the petition for a Writ of Certiorari, filed in the within cause, be denied.

QUESTIONS PRESENTED

The questions are twofold and may more accurately be stated as to first, whether the limitation period provided in the Federal Employers' Liability Act (45 U.S.C.A. Section 56), is procedural or substantive.

Secondly, whether the Ohio Savings Statute (Ohio Revised Code 2305.19) extends the three-year limitation period provided in the Federal Act where the delay in filing was not occasioned either by facts beyond the control of the parties or by the conduct of the defendant-respondent.

STATEMENT OF THE CASE

Although the facts set forth in the Petitioner's "Statement of Case," (Page 4 of Petition), are substantially correct, they disclose that a timely and proper filing was not prevented by either a situation beyond the control of the parties, such as existence of a state of war or by the conduct of the defendant-respondent, such as fraud.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner's Complaint filed in the District Court alleged a cause of action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. The decisions of both federal Courts were accurately based upon and correctly interpreted the substantive limitation period under said Act. 45 U.S.C. § 56.

REASONS FOR DENYING THE WRIT

Petitioner concedes that the American courts prior to 1947 uniformly held that statutory actions generally and the Federal Employers Liability Act (45 U.S.C.A. Section

56) in particular, could not be tolled, after the manner of remedial statutes of limitation for any reason even for fraud or concealment. He attempts to avoid these cases and the principles therein contained. He proceeds with diligence but without an understanding of the precise meaning of the cases on which he relies.

Petitioner places great reliance on the case of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). This merely holds that where a defendant is guilty of fraud he is estopped from setting up the statute of limitations to effectively bar the plaintiff's claim. This case does not hold that the statute of limitations as contained in Section 56 may be tolled at all, but rather that equity will and must hold "that no man may take advantage of his own wrong."

This is the precise holding of the other cases relied upon by the petitioner, namely *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (4th Cir. 1949) cert. den. 339 U.S. 919 (1950); *Fravel* v. *Pennsylvania R. Co.*, 104 F.S. 84 (1952); *Toran* v. *New York, N. Y. and H. R. Co.*, 108 F.S. 564 (1952) and *Central of Georgia Railway Company* v. *Ramsey*, 151 So. 2d 725, Ala. (1963), *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), *Westinghouse Electric Corp.* v. *Pacific Gas and Electric Co.*, 326 F. 2d 575 (CA-9, 1964) *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962); *Gaines* v. *City of New York*, 215 N.Y. 533.

The United States Court of Appeals for the Sixth Circuit in affirming the District Court in the instant case (opinion contained in Appendix B, Page 4A of petition), commented that the *Glus* case according to the Tennessee Court had executed a change in the rule of the earlier cases, agreeing that the rule may have been changed with respect to cases involving fraud. This court found nothing in the *Glus* case overruling previous cases holding that the limitation

in the act was substantive and not procedural. In short, the facts of the *Glus* case were not applicable.

The state court case of *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 346 S.W. 2d 273 (1961) does not aid the petitioner for several reasons. In *Breneman* the defendant's doctor "misadvised" the plaintiff as to the extent of his injuries and the course they might take. Thus as in *Glus* and the other "fraud" cases the plaintiff had been misled by the defendant. Secondly, in *Breneman* plaintiff was seeking in effect to reinstate his action which had originally been commenced within the statutory period. When *Breneman* is considered on its own facts it merely represents another example of the exercise of the Court's equitable jurisdiction. Thirdly, the conclusion expressed as to the present state of federal law is not supported by presently existing decisions.

The other cases relied upon by the petitioner, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F.S. 460 (1949) and *Osbourne* v. *United States*, 164 F. 2d 767 (2d Cir. 1947) are similar to the estoppel cases and might be referred to as war cases. In both the plaintiffs were prevented from bringing their action within time by reason of something over which they had no control — war.

Unlike the situation in the cases cited by petitioner there were no extenuating circumstances in the instant case which excused him from compliance with the three year limitation. There was no fraud. There was no war.

No act of the respondent induced the petitioner to follow the course he took. He filed his action first in the State Court and not in a Federal Court for reasons best known to himself but the choice of the place and filing was exclusively in his control.

The Federal Employers' Liability Act (45 U.S.C.A. Sec. 56) established a new right of action, unknown to the common law. Petitioner sought to avail himself of the

advantages of that act. An integral and substantive provision of that act requires the proper commencement of an action within three years from the day the cause accrued. Having failed to meet that requirement the plaintiff is precluded from maintaining his action. The limitation of that act being substantive in nature, it cannot be extended by the savings clause of the Ohio statute. A state statute cannot recreate a right which has ceased to exist by the terms of the Federal statute creating it.

In *Bell* v. *Wabash Ry. Co.*, 58 Fed. 2d 569 (8th Cir., 1932) the Court said at page 571:

> "An act of Congress, which at the same time, and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions as to the liability itself. Such an act is not a statute of limitations and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates . . . because such limitations are conditions of the liability itself and not limitations of the remedy only.
>
> "In *Atlantic Coastline Railroad* v. *Burnette*, 239 U.S. 200; 36 S. Ct. 75, 76; 60 L. Ed. 226, the Supreme Court discusses this 2 year provision imposed by said Section 6, and says 'It would seem a miscarriage of justice if the plaintiff should recover upon the statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time. It was there held that the action not having been brought within 2 years, it must fail in the courts of a state as well as in those of the United States.' "

This principle that compliance with the time limitation provided in the Federal Employers' Liability Act is a condition precedent and that the limitation relates, not merely to the remedy, but to the right is followed in *American Railroad Company of Porto Rico* v. *Coronas*, 230 Fed.

545; *Reading Co.* v. *Koons, Admr.*, 271 U.S. 58; *Wichita Falls and S. R. Co.* v. *Durham* (1938), 120 S.W. 2d 803; and *Macris* v. *Sociedad Maritima San Nicolas S. A.* (1959), 271 Fed. 2d 956, certiorari denied, March 28, 1960, 80 S. Ct. 757, 362 U.S. 935, 4 L. Ed. 2d 747.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit in reaching its decision followed the existing law. It properly followed the decisions in those cases precisely in point with the issues involved and properly distinguished those cases asserted by the petitioner involving fraud, war, etc. and having no application to the real issues. The petition for a writ of certiorari should be denied and the ruling of the United States Court of Appeals for the Sixth Circuit affirmed.

Respectfully submitted,

Of Counsel
ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio

ROBERT M. DENNIS
Central Trust Tower
Cincinnati, Ohio
Attorney for Respondent

No. 437

In the

SUPREME COURT OF THE UNITED STATES

October Term 1964

OTTO V. BURNETT,

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THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OTTO F. PUTNICK
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Petitioner

Of Counsel:
DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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To the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Petitioner, Otto V. Burnett, files this Reply Brief in support of his Petition for a Writ of Certiorari, in order to refute an argument presented by Respondent.

ADDITIONAL REASON FOR GRANTING THE WRIT

Respondent has argued that an integral and substantive provision of the Federal Employers' Liability Act requires the proper commencement of an action within three years

from the day the cause accrued, citing the case of *Bell* v. *Wabash Ry. Co.*, 58 F. 2nd 569 (8th Cir., 1932).

This same argument, as well as the same citation, was effectively disposed of by this court in *Herb* v. *Pitcairn*, 325 U.S. 77 (1945), with Mr. Justice Jackson stating:

> "We are unable to agree to an interpretation of the Federal Statute by which a case is not 'commenced' for its purposes unless instituted in a court with power to proceed to final judgment. An action is 'commenced' for these purposes as a matter of Federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try and otherwise determine that cause."

Upon reflection, Petitioner submits that the two opinions in *Herb* v. *Pitcairn*, in 324 U.S. 117 and 325 U.S. 77, control all the issues raised in this Petition.

The thrust of the two decisions is that there is nothing in the Federal Employers' Liability Act which prohibits a state statute from creating an exception to the statute of limitations contained in said act, so as to suspend the time of its running; indeed, both Justices Black and Rutledge made this very point in their dissents, on other grounds, to the opinion in 324 U.S. 117, at pp. 131, 132, 133 and 137.

As stated by Mr. Justice Black, 324 U.S. at p. 133:

> "The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unanticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were 'commenced' when they were filed in the City

Courts. Any other construction results in a frustration of the broad objectives of the act."

CONCLUSION

Petitioner submits that the decisions of the lower federal courts in this case have resulted in a frustration of the broad objectives of the Federal Employers' Liability Act; and that the Ohio Savings statute, ORC 2305.19, is that type of state law which permits the transfer of a cause to a court which does have jurisdiction to hear, try and determine that cause, the cause having been commenced, for all purposes by the Federal Act, when originally filed in the state court of Ohio.

Respectfully submitted,

OTTO F. PUTNICK
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Phone: 241-8137
Attorney for Petitioner

Of Counsel:
DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Phone: 241-8137
Attorney for Petitioner

No. 437

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

OTTO V. BURNETT,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

OTTO F. PUTNICK
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Petitioner

Of Counsel:
DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 8th Walnut Street, Cincinnati, Ohio 45202

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 332 F. 2d 529 R. (8-12). The memorandum opinion and order of the District Court is not reported (R. 5-6).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on the 2nd day of June, 1964 (R. 7). The Petition for a Writ of Certiorari was filed on August 28, 1964, and was granted November 16, 1964 (R. 12).

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTION PRESENTED

The question presented is whether the three-year period of limitation applicable to actions for damages under the Federal Employers' Liability Act (45 USC § 56) may be extended by the Ohio Savings Statute (O.R.C. 2305.19).

STATUTES INVOLVED

United States

The first paragraph of Title 45, USC § 56, provides:

> "No actions shall be maintained under this act unless commenced within three years from the day the cause of action accrued."

Ohio

The Ohio Savings Statute is contained in O.R.C. 2305.19.

> "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff . . . fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date."

STATEMENT OF CASE

Petitioner, a resident of Kentucky, an employee of respondent railroad, was injured on March 17, 1960, in Indiana, while in the course of his employment (R. 2). He commenced an action under the Federal Employers' Liability Act, 45 USC § 51, et seq., in the Common Pleas Court of Hamilton County, Ohio, on March 13, 1963 (R. 2). Upon respondent's motion directed to improper venue, petitioner was non-suited in the Ohio court on June 4, 1963 (R. 2).

On June 12, 1963, petitioner refiled this action in the United States District Court for the Southern District of Ohio, relying upon the Ohio Savings Statute, O.R.C. 2305.19 (R. 1). Respondent filed its Motion to Dismiss, alleging that the Complaint had not been filed in the District Court within the three-year limitation period applicable to FELA actions, 45 USC § 56, and that the Ohio Savings Statute was inapplicable; the District Court sustained said Motion, and ordered the action dismissed (R. 4-6). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the court holding that the limitation period was more than procedural, that it was a matter of substance, that failure to bring the action within the time prescribed extinguished the cause of action and that such time could not be extended by the state saving statute (R. 7-12).

It is the contention of petitioner that there is nothing in the language or history of the Federal Employers' Liability Act to indicate that a claim under the Act expires absolutely, for all purposes and under all circumstances, in three years. To the contrary, petitioner submits that the limitation period thereunder is subject to be tolled by the same valid reasons applicable to any other tort action, including war, fraud, estoppel or state saving stat-

utes, as applied to actions originally commenced within the three-year period.

There is no inherent magic in categorizing the limitation period under the Act as substantive or procedural in nature, so as to justify the federal courts giving effect to the Ohio Savings Statute as to common law causes of action (procedural statutes of limitation), but denying the effect of the same Ohio Savings Statute as to a statutory cause of action (substantive statutes of limitation).

The decision of the Court of Appeals in this cause, as well as those very old decisions of other circuits relied upon by that court, holding that the statutory limitation period created by the Federal Employers' Liability Act is substantive in nature, not subject to being extended for any reason, are in direct conflict with those later decisions of other Courts of Appeals. The best exemplification is the decision of the Fourth Circuit in *Scarborough* v. *Atlantic Coastline R. Co.*, 178 F. 2d 253, cert. denied, in 339 U.S. 919, holding that the FELA limitation period could be extended on account of fraud practiced on the plaintiff, and of the Eighth Circuit, in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), holding that the statutory limitation period created by the Clayton Act, 15 USCA §15 b, is procedural in nature, subject to being tolled.

While this Court, in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, established that the limitation period created under the Federal Employers' Liability Act is flexible, and can be tolled by the doctrine of equitable estoppel, the Court has not passed upon the more basic conflict which rages throughout lower courts, both state and federal, i.e., the procedural-substantive dichotomy. It is earnestly submitted that a decision is urgently needed that the congressional intention, in enacting the three-year limitation period under the Federal Employers' Liability

Act in particular, and other federally created rights in general, was simply to set up a uniform statutes of limitation throughout the United States, and that such statutes of limitation are subject to being tolled in the same fashion and for the same reasons as any other statutes of limitation.

In the cases of *Herb* v. *Pitcairn*, in 324 U.S. 117 and 325 U.S. 77, this Court went the greater part of the way in holding that an action under FELA is "commenced," for the purpose of staying the limitation period, when service of process is issued out of the court of original filing, even if that court is unable to proceed to judgment, if the state law permits the transfer to a court which does have jurisdiction to hear and determine the cause without the issuance of new process. The Court specifically reserved its decision as to whether the limitation period would be similarly stayed if state law made new or supplemental process necessary, the exact situation present in the instant cause.

HOW FEDERAL QUESTION IS PRESENTED

The federal question was presented at the outset, the Complaint alleging a cause of action under the Federal Employers' Liability Act, 45 USC § 51, et seq. The decisions of both federal courts were based upon the old, narrow, ritualistic interpretation of the limitation period under said Act, 45 USC § 56.

Petitioner submits that the sole question before this Court is the correct interpretation to be accorded this limitation statute.

ARGUMENT

The decisions of both the Court of Appeals and the District Court in the instant case were based upon the rule that the cause of action under the FELA was created by

statute, that this statute also created the remedy; therefore the limitation period prescribed therein was substantive in nature, and could not be extended.

Petitioner has conceded that prior to 1947, this was the rule.

However, since 1947, courts throughout the United States have reexamined the reasons behind this rule, and have concluded that such holdings were mere semantic distinctions unsupported by reason, and were harsh and unjust. Such courts have in fact largely emasculated the rule by engrafting a growing list of exceptions thereto, based upon various equitable principles.

In the FELA field, we find the decisions of *Osbourne* v. *United States*, 164 F. 2d 767 (1947), CA-2, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F. Supp. 460 (W.D. Pa., 1949), *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253, CA-4, cert. denied 339 U.S. 919, 190 F. 2d 935, 202 F. 2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F. Supp. 84 (D. Md.); and *Toran* v. *New York, N. H. & H. R. Co.*, 108 F. Supp. 564 (D. Mass.), where the Courts have held that the limitation period could be tolled because of war, or on account of fraud practiced on the plaintiff.

The rationale opposing the artificial and mechanistic treatment of the earlier cases was best stated in the *Scarborough* case, *supra*:

> "The decisions in the *Osbourne* and *Frabutt* cases show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances."

This court recognized the sharp conflict between the pre-1947 and post-1947 cases in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, and held that the limitation period under the FELA could be extended by the doctrine of equitable estoppel based on fraud.

Every court which has critically reexamined this rule since 1947 has found a basis for extending the particular statutory limitation period. The cases have followed two broad avenues to reach the same result.

In the cases which have considered the FELA limitation period, the courts have discussed the procedural-substantive dichotomy, but none has made the flat assertion that the limitation statute, 45 USC § 56, was solely procedural in nature. Rather, in each case the exception was based upon equitable considerations which these courts held were so basic as to be applicable to both procedural and substantive limitation statutes.

In contrast to this form of analysis of the FELA limitation, the federal courts, of late, in interpreting the parallel limitation statute under the Clayton Act, 15 USC § 15 b, have flatly asserted that it is procedural in nature, and therefore subject to being extended. As stated in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (CA-8, 1962):

> "While we believe that the controlling factor in determining whether the statute should be tolled for fraudulent concealment is congressional intent, irrespective of the doubtful procedural-substantive dichotomy, if such a classification is significant, it is our view that the evidence supports plaintiff's contention that § 4 b is procedural."

In like vein are the cases of *Public Service Co. of New Mexico* v. *General Electric Co.*, 315 F. 2d 306 (CA-10, 1963) and *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (CA-9 1964).

Petitioner recognizes that all of the post-1947 era cases cited above, as examples of the revolution which has taken place in extending the hitherto restrictive limitations under statutory causes of action, have involved fact situations in which plaintiff found himself in the predicament of being unable to commence his action within the statutory period because of circumstances beyond his own control, the most frequent example being fraudulent concealment. In such extreme circumstances, the courts have felt it necessary to utilize equitable principles to avoid the harsh result inherent in a too-literal interpretation of the particular limitation statute.

The Court of Appeals, in the instant case, noting this thread running through these cases, sought to distinguish petitioner's plight on the ground that he had placed himself in his predicament by his own act in choosing the wrong forum in which to initiate his suit; that such a circumstance did not call forth the same need for equitable intervention by the court as did facts based on fraud.

The fundamental error in this analysis is that the Court overlooked the fact that savings statutes of the type involved in this action were originally enacted in the various states, and thereafter applied as part of the procedural law by the federal courts, in order to satisfy the same basic need for equitable intervention as existed in the case of fraud.

This Court has recognized the common equitable background of the two situations. In discussing the legislative history of the removal statute, 28 USC § 1406 (a), which prevents, as between federal courts, the same injustice as savings statutes do between state courts, this Court, in *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962), held:

> "The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their

actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn.

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, congress, by the enactment of § 1406 (a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities'."

Justice Cardozo, while on the New York bench, made similar observations regarding the savings statutes in *Gaines* v. *City of New York* (1915), 215 N.Y. 533, 109 N. E. 594 at page 596.

This Court, in the twin decisions in *Herb* v. *Pitcairn*, 324 U.S. 117 and 325 U.S. 77, swept past the procedural-substantive dichotomy, and had no difficulty recognizing the need for such an exception to the limitation period of the FELA, indeed, both Justices Black and Rutledge commented on the need for such an exception in their dissents, on other grounds, to the opinion in 324 U.S. 117, at pp. 131, 132, 133 and 137.

As stated by Mr. Justice Black, at p. 133:

"The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unan-

> ticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were 'commenced' when they were filed in the City Courts. Any other construction results in a frustration of the broad objectives of the act."
>
> "If for instance it should be the state law that local causes are sufficiently commenced from the time of filing the complaint, though in the wrong court for reasons of jurisdiction relating to trial and decision, if nevertheless upon discovery of the error the cause is transferred to another court having complete jurisdiction, nothing in § 6 or the Federal Employers' Liability Act requires or permits suits brought under that Act to be treated differently."

It is petitioner's contention that it is logically unsound to permit, as did the Court of Appeals, the FELA limitation statute, 45 USC § 56, to be tolled by reason of war, fraud, fraudulent concealment or estoppel, but to balk at recognition of the next logical and necessary step, to wit: that these same equitable principles demand that such limitation period also be tolled by a saving statute, in a case where the action was first commenced within the statutory period, but where the plaintiff had stumbled into a venue pitfall, necessitating a transfer to a fully competent court.

This Court's decision in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, might have been more fortunate if it had cut through the profitless semantics of the procedural-substantive debate entirely, as did the Federal cases cited above, or, failing that, at least have clearly stated beyond doubt or quibble, that the limitation statute involved was procedural in nature, and subject to being tolled by the same equitable factors as any other remedial statute. The failure to do so has resulted in the lower federal and state courts being left to their own devices in interpreting the extent of the applicability of the *Glus* case.

On the one hand we find the Court of Appeals of Tennessee, in *Breneman* v. *C. N. O. & T. P. Ry. Co.*, 346 S.W. 2d 273 (1961), in a fact situation closely analogous to the instant case, holding that the FELA limitation period was tolled by the Tennessee Saving Statute, T.C.A. § 28-106, which is comparable to Ohio Revised Code § 2305.19, and basing their decision on the proposition:

> "Although there is a conflict in the Federal cases, we think *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 has effected a change in the rule of earlier cases."

and concluding:

> "We are not unmindful that the saving statute, T.C.A. § 28-106 applies only to a statute of limitations which relates to the remedy. *Automobile Sales Co.* v. *Johnson*, 174 Tenn. 38, 122 S.W. 2d 453, 120 ALR 370. As we have seen, however, under the Federal law the distinction has been abolished and is no longer recognized with respect to actions under the Federal Employers' Liability Act. The limitation being procedural only a new action may be instituted within one year after a voluntary dismissal."

We also find the Ninth Circuit, in *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (1964), holding:

> "Many of the cases supporting appellant's contention do so by way of dicta. See *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. p. 234, 79 S. Ct. p. 762, 3 L. Ed. 2d 770. We believe, where circumstances dictate, the trend is toward applying the fraudulent concealment exception to all statutes of limitation, be they limitations on the right itself or merely on the remedy."

At the same time, we find the Court of Appeals, in the instant case, stating:

> "We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the Limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inopposite. We prefer to follow the decisions in *Bell, Gibson Lumber Co.* and *Cotton, supra,* which are precisely in point.
>
> "We are not prepared to extend the rule in *Glus* to the facts of the present case."

Additionally, the instant cause goes that one step further than the situation presented in *Herb* v. *Pitcairn,* 325 U.S. 77, in that the Ohio Savings Statute, O.R.C. 2305.19, made new process necessary in the transfer of the cause to the United States District Court. The issue is squarely put to the Court to resolve the one question left unanswered in *Herb* v. *Pitcairn,* 325 U.S. 77 at p. 79,

> "whether the action would be barred if state law made new or supplemental process necessary . . . ."

Petitioner submits that a logical extension of the rules announced in *Herb* v. *Pitcairn,* 325 U.S. 77 and *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 requires a negative answer to that question, and a decision by this Court that statutes of limitation, be they limitations on the right itself or merely on the remedy, are subject to the very same exceptions, and specifically, that the federal Employers' Liability Act limitation period can be tolled by an appropriate state savings statute. Such a decision would not only be in accord with the reasoning of prior decisions of this Court, but would remove the distressing uncertainties and conflicts into which lower courts presently have fallen.

CONCLUSION

Petitioner submits that the limitation statute under the Federal Employers' Liability Act, 45 USC § 56, has never been interpreted by this Court as being substantive in nature, not subject to extension by an applicable state saving statute. On the contrary, the logical extension of the rules of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Herb* v. *Pitcairn*, 325 U.S. 77, allows no other conclusion but that such statute may be so tolled.

Because the United States Court of Appeals for the Sixth Circuit erroneously considered that it was not bound to follow such rules, its decision should be reversed, and the cause remanded for trial on the merits.

Respectfully submitted,

OTTO F. PUTNICK
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Petitioner

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In The

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October Term, 1964

OTTO V. BURNETT,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio
Attorney for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

TO the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

QUESTIONS PRESENTED

The Questions are twofold and may more accurately be stated as to first, whether the limitation period provided

in the Federal Employers' Liability Act (45 U.S.C.A. Section 56), is procedural or substantive.

Secondly, whether the Ohio Savings Statute (Ohio Revised Code 2305.19) extends the three-year limitation period provided in the Federal Act where the delay in filing was not occasioned either by facts beyond the control of the parties or by the conduct of the defendant-respondent.

STATEMENT OF THE CASE

Those facts contained in the first two paragraphs of Petitioner's "statement" (page 3 of Brief), are substantially correct and disclose that a timely and proper filing was not prevented by either a situation beyond the control of the plaintiff, such as existence of a state of war or by the conduct of the defendant respondent, such as fraud.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner's Complaint filed in the District Court alleged a cause of action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. The decisions of both federal Courts were accurately based upon and correctly interpreted the substantive limitation period under said Act. 45 U.S.C. § 56.

ARGUMENT

Petitioner concedes that the American courts prior to 1947 uniformly held that statutory actions generally and the Federal Employers Liability Act (45 U.S.C.A. Section 56) in particular, could not be tolled for any reason even for fraud or concealment. He attempts to avoid these cases and the principles therein contained. He proceeds with diligence but without an understanding of the precise meaning of the cases on which he relies.

Petitioner places great reliance on the case of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). This merely holds that where a defendant is guilty of fraud he is estopped from setting up the statute of limitations to effectively bar the plaintiff's claim. This case does not hold that the statute of limitations as contained in Section 56 may be tolled at all, but rather that equity will and must hold "that no man may take advantage of his own wrong."

This is the precise holding of the other cases relied upon by the petitioner, namely *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (4th Cir., 1949) cert. den. 339 U.S. 919 (1950); *Fravel* v. *Pennsylvania R. Co.*, 104 F.S. 84 (1952); *Toran* v. *New York, N. Y. and H. R. Co.*, 108 F.S. 564 (1952) and *Central of Georgia Railway Company* v. *Ramsey*, 151 So. 2d 725, Ala. (1963), *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), *Westinghouse Electric Corp.* v. *Pacific Gas and Electric Co.*, 326 F. 2d 575 (CA-9, 1964), *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962); *Gaines* v. *City of New York*, 215 N.Y. 533.

The United States Court of Appeals for the Sixth Circuit in affirming the District Court in the instant case (opinion contained in Appendix B, Page 4A of petition), commented that the *Glus* case according to the Tennessee Court had executed a change in the rule of the earlier cases, agreeing that the rule may have been changed with respect to cases involving fraud. This court found nothing in the *Glus* case overruling previous cases holding that the limitation in the act was substantive and not procedural. In short, the facts of the *Glus* case were not applicable.

The state court case of *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 346 S.W. 2d 273 (1961) does not aid the petitioner for several reasons. In *Breneman* the defendant's doctor "misadvised" the plaintiff as

to the extent of his injuries and the course they might take. Thus as in *Glus* and the other "fraud" cases the plaintiff had been misled by the defendant. Secondly, in *Breneman* plaintiff was seeking in effect to reinstate his action which had originally been commenced within the statutory period. When *Breneman* is considered on its own facts it merely represents another example of the exercise of the Court's equitable jurisdiction. Thirdly, the conclusion expressed as to the present state of federal law is not supported by presently existing decisions.

The other cases relied upon by the petitioner, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F.S. 460 (1949) and *Osbourne* v. *United States*, 164 F. 2d 767 (2d Cir., 1947) are similar to the estoppel cases and might be referred to as war cases. In both the plaintiffs were prevented from bringing their action within time by reason of something over which they had no control — war.

Unlike the situation in the cases cited by petitioner there were no extenuating circumstances in the instant case which excused him from compliance with the three year limitation. There was no fraud. There was no war.

No act of the respondent induced the petitioner to follow the course he took. He filed his action first in the State Court and not in a Federal Court for reasons best known to himself but the choice of the place and filing was exclusively in his control.

The Federal Employers' Liability Act (45 U.S.C.A. Sec. 56) established a new right of action, unknown to the common law. Petitioner sought to avail himself of the advantages of that act. An integral and substantive provision of that act requires the proper commencement of an action within three years from the day the cause accrued. Having failed to meet that requirement the plaintiff is precluded from maintaining his action. The limitation of that act being substantive in nature, it cannot be ex-

tended by the savings clause of the Ohio statute. A state statute cannot recreate a right which has ceased to exist by the terms of the Federal statute creating it.

In *Bell* v. *Wabash Ry. Co.*, 58 Fed. 2d 569 (8th Cir., 1932) the Court said at page 571:

> "An act of Congress, which at the same time, and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions as to the liability itself. Such an act is not a statute of limitations and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates . . . ' because such limitations are conditions of the liability itself and not limitations of the remedy only.
>
> "In *Atlantic Coastline Railroad* v. *Burnette*, 239 U.S. 200: 36 S. Ct. 75, 76: 60 L. Ed. 226, the Supreme Court discusses this 2 year provision imposed by said Section 6, and says 'It would seem a miscarriage of justice if the plaintiff should recover upon the statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time. It was there held that the action not having been brought within 2 years, it must fail in the courts of a state as well as in those of the United States.' "

This principle that compliance with the time limitation provided in the Federal Employers' Liability Act is a condition precedent and that the limitation relates, not merely to the remedy, but to the right is followed in *American Railroad Company of Porto Rico* v. *Coronas*, 230 Fed. 545; *Reading Co.* v. *Koons, Admr.*, 271 U.S. 58; *Wichita Falls and S. R. Co.* v. *Durham* (1938), 120 S.W. 2d 803; and *Macris* v. *Sociedad Maritima San Nicolas S. A.* (1959), 271 Fed. 2d 956, certiorari denied, March 28, 1960, 80 S. Ct. 757, 362 U.S. 935, 4 L. Ed. 2d 747.

CONCLUSION

The cases tolling a federal statute of limitations where the plaintiff was prevented from filing his suit in a timely and proper manner because of war, fraud, or misrepresentation reflect justice in our federal courts. In this case no such situation existed. One of the fundamental purposes of the Statute of Limitations is to protect a potential defendant from suit on a claim arising years previously and being confronted with attendant problems of investigation, location of witnesses, refuting injuries now healed, etc.

Certainly, a citizen should have his day in court and our Congress saw fit to give a plaintiff, in this case, Otto V. Burnett, under the Federal Employers' Liability Act the benefit of approximately 1,095 days to avail himself of such right. Again, for some unknown reason or reasons this plaintiff waited until five days before the three year period expired to attempt to commence his action.

Bearing in mind that this is a federal law and one in which an inherent purpose is to establish a uniform cause of action to apply in a uniform manner to all citizens of all states, we respectfully submit that under the facts of this case to permit a state statute to toll the federal limitation would result in a Georgia litigant having three years and six months to properly bring his action under such FELA; an Indiana litigant, three years plus five more years; Kansas, three years plus six months; Kentucky, three years plus ninety days; Maryland, only three years as no saving statute exists; Michigan three years plus ninety days, and so on. We further submit that if this was the intention of Congress, provisions for such application could and would have been set forth in the Act.

The United States Court of Appeals for the Sixth Circuit in reaching its decision followed the existing law. It

properly followed the decisions in those cases precisely in point with the issues involved and properly distinguished those cases asserted by the petitioner involving fraud, war, etc. and having no application to the real issues. The petition for a writ of certiorari should be denied and the ruling of the United States Court of Appeals for the Sixth Circuit affirmed.

Respectfully submitted,

ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio 45202
Attorney for Respondent